IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO. 438

BROWN LAND & ROYALTY COMPANY, INC.,

Petitioner and Appellant below,

VERSUS

FRANCES CLARK GREEN, ET AL.,

Respondents and Appellees below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, APPELLEES BELOW FRANCES CLARK GREEN, ET AL.

To the Honorable the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has been reported in 198 F. 2d 74-77, and is found at page 14 of the Record.

GROUNDS ON WHICH JURISDICTION IS INVOKED BY PETITIONER

Petitioner seeks a writ of certiorari under Title 28, U.S.C., Section 1254.

ARGUMENT

PETITIONER'S SPECIFICATION OF ERROR NO. I.

Petitioner contends that the Court of Appeals deprived it of its right to rely upon and be protected by the Public Records.

Nothing said by the Court of Appeals does violence to the rule that an innocent purchaser for value is entitled to rely upon the public records. The Court of Appeals did properly hold, in accordance with applicable Louisiana decisions, that the documents allegedly relied on by petitioner and recorded in the public records did not divest respondents of their mineral rights or recognize those mineral rights in anyone other than respondents.

The decisions which petitioner says were "ignored" by the Court of Appeals, of course, were not ignored. They were all thoroughly discussed in voluminous briefs and in extensive oral argument before the Court. The Court concluded, properly, that what petitioner considered to be applicable decisions in support of its position were not, in fact, applicable, and did not support petitioner.

PETITIONER'S SPECIFICATION OF ERROR NO. II.

Here petitioner asserts that the Court of Appeals erred in holding that the instrument relied upon by petitioner trans-

ferred a usufruct only, and further erred in failing to follow "applicable Louisiana authorities."

The opinion of the Court of Appeals demonstrates the lack of merit in this contention of petitioner. The Court of Appeals did not, as petitioner says, fail to discuss "any of the Louisiana cases referred to." The Court of Appeals makes specific reference to the cases relied on there by petitioner-appellant, and specifically stated that its conclusion was reached "after carefully considering the authorities relied upon by the appellant and those relied on by the appellees. . . ."

The simple proposition is that petitioner argued below that certain Louisiana decisions controlled this case favorably to petitioner; the Court of Appeals studied the matter thoroughly, carefully considered the cases relied on by petitioner, and held otherwise. What petitioner apparently would have Your Honors do would be to consider this case as one of first impression, study all the cases relied on by both sides anew, and redetermine the case as if it were being heard for the first time on appeal. We respectfully submit that certiorari should not be granted on that basis.

PETITIONER'S SPECIFICATION OF ERROR NO. III

Next, says petitioner, it was denied due process of law because there was no trial ordered at which it could have placed evidence in the Record showing the intention of the parties.

The points made by alleged Error No. III, as well as by alleged Error No. IV to be discussed infra, were not urged by petitioner in the Court of Appeals. Its Statement of Points, found on page 100 of the Record, makes no reference whatever to petitioner's present contention that it wanted to offer

evidence of intention. Nor is this argument made in any of the briefs filed by petitioner in the Court of Appeals. It could hardly be correctly said that the Court of Appeals erred when petitioner, appellant below, failed to ask the Court of Appeals to consider the question now raised. As more fully shown hereafter, we believe the great weight of authority is to the effect that even if a litigant urges a matter in a District Court, if on appeal he abandons it by failing to assert it as appellant, he should not be permitted to base a petition for certiorari on that point.

By pretermitting that, any such evidence as petitioner now says it should be permitted to offer would be clearly inadmissible. As was fully shown by briefs below, this is a petitory action where petitioner here must rely on the strength of its own title, as shown by the instruments which are recorded in the public records. Evidence as to what the parties may have intended by the written instruments would not be admitted.

See:

Ker v. Eversheд (1889), 41 La. Ann. 15, 6 So. 566

Bank of Napoleonville v. Knoblock & Rainold (1918), 144 La. 100, 80 So. 214

Landeche Bros. Co., Ltd. v. N.O. Coffee Co., Ltd. (1931), 173 La. 701, 138 So. 513

McGuire v. Nelson Bros. (1933), 177 La. 302, 148 So. 56

Planters Fertilizer & Chemical Co. v. Barton (1920), 147 La. 15, 84 So. 440

Vaughan v. McInerney & Co., et al. (1943), 12 So. 2d 516

Blackman v. Wainer (1944), 19 So. 2d 678

Weinberger v. Merchant's Ins. Co. (1889), 41 La. Ann. 31, 5 So. 728

The Court of Appeals concluded as a matter of law, based upon truly applicable Louisiana decisions, that it was "under the clear conviction that the 'donation' evidences the transfer of a usufruct only and not a fee title." The instrument itself controlled; under those circumstances no parol evidence whatever would be admissible.

PETITIONER'S SPECIFICATION OF ERROR NO. IV

As applied to the facts of this case the matter here raised has no more substance than the others relied on by petitioner. However, we deem it unnecessary to engage in extensive discussion of this point here.

The contention raised by this Specification of alleged Error was never alleged nor intimated by the pleadings in the District Court; it was never presented in argument or brief in the District Court; it was not included in the Statement of Points filed by petitioner-appellant; nor was it ever mentioned in oral argument or briefs in the Court of Appeals.

Petitioner now mentions this point for the very first time, and seeks to inject it into this case in petition for certiorari. We submit that this cannot be done—certainly not in this type of case.

It is well settled that in the absence of some pressing and compelling reason (which certainly does not exist here), a matter not presented to the Courts below cannot be raised for the first time on appeal or in petition for certiorari. There are many sound reasons for this rule and they take on more significance when the new matter appears for the first time

in an application for certiorari to this Court. The cases which announce this rule are many. Among them are:

Duignan v. United States et al. (1927), 47 S. Ct. 566, 274 U.S. 195

Board of Commissioners for the Atchafalaya Basin Levee District v. Smyth (1951), 187 F. 2d 11, cert. den. 72 S. Ct. 39, 342 U.S. 821

New York Life Ins. Co. v. Calhoun (1940), 114 F. 2d 526, cert. den. 61 S. Ct. 141, 311 U.S. 701

Chatz v. Midco Oil Corp. (1945), 152 F. 2d 153, cert. den. 67 S. Ct. 49, 329 U.S. 717; reh. den. 67 S. Ct. 181, 329 U.S. 825.

CONCLUSION

This case has been thoroughly briefed, argued, and considered below in all its phases. It involves a Louisiana land title. Petitioner caused the case to be removed to the United States District Court, and by counterclaim assumed the burden of a plaintiff in a petitory action.

The case was decided adversely to petitioner by the District Judge who is a competent and experienced Louisiana attorney. This decision was upheld by the Court of Appeals after full consideration, after having had the benefit of elaborate briefs and oral argument. A determination of which Louisiana decisions were applicable was made by the Court of Appeals, as its opinion plainly states, and those decisions were followed.

We submit that Your Honors should not be called upon, on petition for certiorari, to redetermine all issues presented below and also new issues injected here, and then to deter-

mine whether the Court of Appeals was, in your judgment, right or wrong. Even if the views of this Court do not coincide with those of the Court of Appeals, this is not ground in itself for granting certiorari. Denial of certiorari carries no implication of support of the judgment below or the views in the opinion supporting it. See:

State of Maryland v. Baltimore Radio Show (1950), 70 S. Ct. 252, 338 U.S. 912

Agoston v. Commonwealth of Pennsylvania (1950), 71 S. Ct. 9, 340 U.S. 844.

We submit that none of the reasons suggested by Rule 38, paragraph 5, of the Rules of this Court, exist here for granting certiorari; and there are no other special or important reasons which call for this case to be reviewed on certiorari.

For these reasons and the reasons set out in the briefs of these respondents filed in the Court of Appeals for the Fifth Circuit, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

RICHARD C. CADWALLADER,
Member of the Bar of the Supreme Court of the United States.
Louisiana National Bank Building,
Baton Rouge, Louisiana.
Counsel for Respondents, Frances Clark Green, Agnes Clark Worsham, Florena Clark Thomas, Hattie C. Pickett, Toral E. Clark, and Samuel H. Clark.

Of Counsel:

Ferd C. Claiborne,
New Roads, Louisiana.
Charles H. Dameron,
Calvin E. Hardin, Jr.,
Bert E. Durrett,
Wallace A. Hunter,
Baton Rouge, Louisiana.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing brief have this day been served upon each counsel for petitioner by mailing same, postage prepaid, to Robert G. Chandler, Esq., Attorney at Law, 918 Commercial Building, Shreveport, Louisiana, and to Frank J. Looney, Esq., Attorney at Law, 615 Herndon Avenue, Shreveport, Louisiana, Attorneys of Record for petitioner.

Baton Rouge, Louisiana, this 15th day of December, 1952.

RICHARD C. CADWALLADER,
Counsel for Respondents above named.

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